

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

Knology, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. PA 01-006
	)	
Georgia Power Company,	)	
	)	
Respondent.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** November 14, 2003

**Released:** November 20, 2003

By the Commission:

**I. INTRODUCTION**

1. In this Order, we grant in part and deny in part a pole attachment complaint that Knology, Inc. (“Knology”) filed against Georgia Power Company (“Georgia Power”) pursuant to section 224 of the Communications Act of 1934, as amended (“Act”).<sup>1</sup> In particular, we grant Knology’s claims that Georgia Power imposed unjust and unreasonable terms and conditions of attachment by (1) charging Knology the entire cost of inspecting Knology’s attachments one year or more after the attachments were installed; (2) failing to allocate among all attachers certain common costs; (3) assessing against Knology certain excessive charges; and (4) failing to provide Knology sufficiently detailed billing information. We deny the remainder of Knology’s claims. We further order Georgia Power, as more particularly set forth herein, to refund to Knology certain amounts paid since June 8, 2001.<sup>2</sup> We also direct Georgia Power to recalculate certain overhead expenses and encourage the parties to reach agreement on these expenses after the recalculation.

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<sup>1</sup> 47 U.S.C. § 224.

<sup>2</sup> See III(B)(5), *infra*.

## II. BACKGROUND

### A. The Parties and the Pole Attachment Agreement

2. Knology is a franchised cable television operator and certified local exchange carrier providing cable, interstate and intrastate telecommunications, and Internet access service in Georgia.<sup>3</sup> In particular, Knology serves the cities of Augusta, Columbus, Evans, Forest Hills, Grovetown, Martinez, and Midland, Georgia.<sup>4</sup>

3. Georgia Power is an electric utility that generates and distributes electricity to over 1.8 million customers throughout Georgia.<sup>5</sup> As such, Georgia Power owns and controls facilities used to distribute electricity, including poles that are subject to the mandatory access provisions of section 224.<sup>6</sup> The State of Georgia has not certified to the Commission that it regulates the rates, terms, or conditions of pole attachments.<sup>7</sup>

4. In February 1998, Knology and Georgia Power entered into a Georgia Power Company Standard Pole Attachment Agreement (“Agreement”).<sup>8</sup> The Agreement allows Knology to attach its facilities to Georgia Power’s poles in exchange for the payment of an annual rental fee.<sup>9</sup> With respect to modifications to Georgia Power poles or other make-ready work necessitated by Knology’s attachments, paragraph 7.2 of the Agreement requires Knology

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<sup>3</sup> Complaint, File No. PA 01-006 (filed Nov. 21, 2001) (“Complaint”) at 1, ¶ 2. Georgia Power describes Knology as “one of the leading providers of broadband communications services, analog and digital cable, local and long distance telephony and high-speed Internet access to small and medium sized cities throughout the southeast.” Response of Georgia Power to Knology’s Complaint, File No. PA 01-006 (filed Dec. 21, 2001) (“Response”) at 1-2.

<sup>4</sup> Complaint at 1-2, ¶ 2.

<sup>5</sup> Complaint at 2, ¶ 3; Response at 2. In accordance with 47 C.F.R. § 1.1404(c), the Complaint states that Georgia Power is not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State. Complaint at 2, ¶ 6.

<sup>6</sup> Complaint at 2, ¶ 5; Response at 2.

<sup>7</sup> Complaint at 2, ¶ 7. See 47 C.F.R. § 1.1404(c) (requiring pole attachment complaints to represent that the relevant state has not so certified). See also <http://www.fcc.gov/eb/mdrd/PoleAtt.html> (citing *States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992)).

<sup>8</sup> Complaint, Exhibit 1. Knology claims that Georgia Power improperly terminated the Agreement effective December 31, 2000, and that thereafter Georgia Power deemed Knology to have accepted its new standard pole attachment agreement. Complaint at 3-4, ¶¶ 11-12 & Exhibit 2. Georgia Power explains, however, that the termination letter attached to the Complaint pertained to a contract between Georgia Power and Knology of Columbus, a separate Knology affiliate. Thus, Georgia Power concedes that the 1998 Agreement remains in effect and governs this dispute. Response at 8 n.41.

<sup>9</sup> Complaint, Exhibit 1 (Agreement) at 4, ¶ 7.1.

to reimburse Georgia Power for all associated costs.<sup>10</sup> Similarly, paragraph 3.3 of the Agreement states that Knology “shall be responsible for its individual costs plus its proportionate share of all joint costs associated with work performed in accordance with Section 3.2 [Alterations of Poles and Equipment]. [Knology] shall reimburse Georgia Power for any reasonable costs incurred in performing such work based upon Georgia Power’s standard charges for such services.”<sup>11</sup> The Agreement also requires Knology to reimburse Georgia Power for its fees and disbursements relating to “administrative services not otherwise required to be performed under this agreement.”<sup>12</sup>

### **B. Knology’s Attachments to Georgia Power’s Poles**

5. In 1998, Knology began constructing an independent network to provide video, telecommunications, and Internet services in Augusta, Georgia.<sup>13</sup> Part of this network construction involved the attachment of Knology’s cables and equipment to Georgia Power’s poles.<sup>14</sup> According to Knology, Georgia Power prohibits Knology from performing its own construction on Georgia Power’s poles.<sup>15</sup> Rather, Knology must use two Georgia Power contractors, Utility Consultants Inc. (“UCI”) and Utilities Support Systems (“USS”).<sup>16</sup> UCI conducts pole inspections and performs construction prior to the installation of Knology’s attachments, while USS inspects poles after installation.<sup>17</sup> In addition, after USS performs its

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<sup>10</sup> Complaint, Exhibit 1 (Agreement) at 4, ¶ 7.2.

<sup>11</sup> Complaint, Exhibit 1 (Agreement) at 3, ¶ 3.3.

<sup>12</sup> Complaint, Exhibit 1 (Agreement) at 7, ¶ 16.6.

<sup>13</sup> Complaint at 4, ¶ 13.

<sup>14</sup> Complaint at 4, ¶ 13.

<sup>15</sup> Complaint at 7 n.13.

<sup>16</sup> Complaint at 8 n.14. Late in this proceeding, Georgia Power argued that it was not responsible for amounts Knology allegedly owes to USS and UCI. Letter to Marlene H. Dortch, Secretary, FCC, from James A. Stenger, counsel for Georgia Power, File No. PA 01-006 (Oct. 30, 2002) (“Georgia Power’s Response to Commission’s Requests”) at 6; Letter to Marlene H. Dortch, Secretary, FCC, from James A. Stenger, counsel for Georgia Power, File No. PA 01-006 (Nov. 20, 2002) (“Georgia Power’s Reply to Knology’s Response to Commission’s Requests”) at 6-7 & n.4. Georgia Power failed to raise this issue in its Response, however, and there is an inadequate record on which to assess the merits of the argument. Accordingly, we decline to address it. *See, e.g., AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130, 16133 n.18 (2001); *Consumer.Net v. AT&T Corp.*, Order, 15 FCC Rcd 281, 300, ¶ 40 n.93 (1999) (declining to consider an argument raised for the first time in the briefs). *Cf. Building Owners and Managers Association International v. FCC*, 254 F.3d 89, 100 n.14 (D.C. Cir. 2001) (declining to address an issue raised cursorily in the brief).

<sup>17</sup> Complaint at 8 n.14.

post-construction inspection, UCI makes further engineering recommendations for additional construction.<sup>18</sup>

6. Through November 2001, Georgia Power and its contractors billed Knology in excess of \$6 million.<sup>19</sup> Knology paid these invoices until approximately May 2001, when the total charges associated with the project appeared to Knology to be excessively high.<sup>20</sup> Thereafter, Knology paid only a portion of the assessed charges.<sup>21</sup>

7. On June 8, 2001, Knology's Director of Make Ready, Wayne Singleton, wrote to Georgia Power indicating that he "recently started a cost and production evaluation of [Knology's] Augusta project" and requesting that Georgia Power provide information (such as field measurements and notes, construction recommendations, and billing records) that would assist in his review of make-ready charges Georgia Power had levied.<sup>22</sup> Although Georgia Power provided Knology some information, Knology considers Georgia Power's responses to be inadequate.<sup>23</sup> Nevertheless, Mr. Singleton conducted an "audit" of Georgia Power's make-ready charges and practices ("Singleton Audit"), the results of which form the basis of Knology's Complaint.<sup>24</sup>

### C. The Proceeding Before the Commission

8. Knology filed a Complaint with the Commission on November 21, 2001. Based upon the Singleton Audit, the Complaint alleges that Georgia Power: (1) double billed Knology for certain engineering and construction charges in the amount of approximately \$132,000; (2) overbilled Knology in the amount of approximately \$318,184 for performing comprehensive pole surveys under the guise of post-inspection of Knology's attachments; (3) performed work on the pole network that is not specific to or otherwise caused by Knology's attachments and charged Knology in excess of \$1.4 million for this work rather than apportioning the charges among the various attachers to the poles; (4) imposed unreasonable and excessive overhead charges notwithstanding the concomitant application of general surcharges amounting to

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<sup>18</sup> See Complaint, Affidavit of Wayne Singleton ("Singleton Affidavit") at 8, ¶ 15.

<sup>19</sup> Complaint at 4, ¶ 14.

<sup>20</sup> Complaint at 4, ¶ 16.

<sup>21</sup> See generally Response of Knology, Inc. to the Commission's Request for Additional Information, File No. PA 01-006 (filed Oct. 30, 2002) ("Knology's Response to Commission's Requests") (explaining that Knology paid, after June 8, 2001, certain amounts that were invoiced before June 8).

<sup>22</sup> Complaint, Singleton Affidavit at Exhibit 1 (Letter dated June 8, 2001 to Mark Mills, Georgia Power, from Wayne Singleton, Director of Make Ready, Knology) at 1.

<sup>23</sup> Complaint at 4-5, ¶¶ 19-22.

<sup>24</sup> Complaint at 6, ¶ 23.

\$600,000; and (5) refused to itemize, describe, or otherwise provide clarifying information that would assist Knology in identifying the basis for Georgia Power's make-ready charges.<sup>25</sup> The Complaint seeks a declaration that Georgia Power's make-ready practices are unlawful, a refund of amounts Georgia Power improperly billed Knology (including amounts Knology paid prior to the filing of the Complaint), and an order requiring Georgia Power to modify its practices in the future.<sup>26</sup>

9. Georgia Power filed a Response to Knology's Complaint on December 21, 2001. The Response denies each count of the Complaint, asserting that (1) Knology and other attachers were responsible for repeated engineering recommendations and duplicative construction;<sup>27</sup> (2) the pre-construction and post-construction inspections were part of the make-ready process, and Knology was the sole beneficiary of the inspections;<sup>28</sup> (3) all costs charged to Knology were reasonable and consistent with Georgia Power's right to recover the fully allocated cost of providing pole attachments;<sup>29</sup> and (4) Georgia Power provided all documentation in a timely manner.<sup>30</sup> In addition, the Response contends that the Complaint should be dismissed, because the Commission lacks jurisdiction, the case is not ripe for review, and the Complaint is procedurally defective.<sup>31</sup> Finally, the Response asserts that, under the Commission's rules and the Agreement, any refund obligation by Georgia Power would be limited to payments Knology made after the filing of the Complaint.<sup>32</sup>

10. Knology submitted a Reply on January 10, 2002, which takes issue with the jurisdictional, ripeness, and procedural objections raised in the Response<sup>33</sup> and argues that Georgia Power's defenses to Knology's substantive claims are without merit.<sup>34</sup> In addition, the Reply reiterates that, in order to avoid an unjust result, the Commission should order refunds of Knology's pre-complaint payments for unreasonable make-ready practices.<sup>35</sup>

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<sup>25</sup> Complaint at 6-7, ¶ 24.

<sup>26</sup> Complaint at 32-35, ¶ 72.

<sup>27</sup> Response at 14-18.

<sup>28</sup> Response at 18-23.

<sup>29</sup> Response at 23-25.

<sup>30</sup> Response at 26.

<sup>31</sup> Response at 6-14.

<sup>32</sup> Response at 27-32.

<sup>33</sup> Reply, File No. PA 01-006 (filed Jan. 10, 2002) ("Reply") at 5-17.

<sup>34</sup> Reply at 17-30.

<sup>35</sup> Reply at 30-34.

11. On June 6, 2002, with the assistance of Commission staff, the parties attempted unsuccessfully to resolve their dispute through mediation. As a byproduct of their negotiations, however, the parties each moved to supplement the record in this proceeding with extensive information relating to the various charges at issue in the Complaint.<sup>36</sup> Georgia Power opposed Knology's Motion for Leave.<sup>37</sup> Despite concerns that one or both parties were less than diligent in ensuring the completeness of their initial pleadings, and in the interest of obtaining a complete record on which to decide the case, Commission staff granted the parties' motions<sup>38</sup> and permitted each side an opportunity to respond to the other side's supplement.<sup>39</sup>

12. Finally, on September 25, 2002, Commission staff issued a letter to the parties requesting additional specific information relating to the claims raised in this proceeding.<sup>40</sup> Among other things, Commission staff asked questions pertaining to pole inspections, pole change-outs, engineering recommendations, and overhead charges. Each party filed a voluminous response<sup>41</sup> and a reply.<sup>42</sup> After the parties' final submissions in this case, neither

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<sup>36</sup> Motion for Leave to File Supplemental Information, File No. PA 01-006 (filed June 24, 2002) ("Knology's Motion for Leave"); Motion of Georgia Power Company for Leave to File Supplemental Information, File No. PA 01-006 (filed June 24, 2002) ("Georgia Power's Motion for Leave"). *See* Supplemental Information, File No. PA 01-006 (filed June 24, 2002) ("Georgia Power's Supplemental Information").

<sup>37</sup> Opposition of Georgia Power Company to Knology Motion for Leave to File Supplemental Information, File No. PA 01-006 (filed July 1, 2002) ("Georgia Power's Opposition to Knology's Motion for Leave").

<sup>38</sup> *See* Letter to Stephen R. Bell and Gunnar D. Halley, counsel for Knology, and Robert P. Williams, II, Charles A. Zdebski, Todd M. Stein, and Jennifer A. Kerkhoff, counsel for Georgia Power, from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, File No. PA 01-006 (July 2, 2002) at 2.

<sup>39</sup> *See* Georgia Power's Opposition to Knology's Motion for Leave at 2-10; Reply of Knology, Inc. to the Supplemental Information Filed by Georgia Power Company, File No. PA 01-006 (filed July 15, 2002) ("Knology's Reply to Georgia Power's Supplemental Information").

<sup>40</sup> Letter to Stephen R. Bell and Gunnar D. Halley, counsel for Knology, and Robert P. Williams, II, Charles A. Zdebski, Todd M. Stein and Jennifer A. Kerkhoff, counsel for Georgia Power, from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, File No. PA-01-006 (Sept. 25, 2002) ("Commission's Requests").

<sup>41</sup> *See* Knology's Response to Commission's Requests; Georgia Power's Response to Commission's Requests.

<sup>42</sup> Reply of Knology, Inc. to Georgia Power Company's Response to the Commission's Request for Additional Information, File No. PA 01-006 (filed Nov. 21, 2002) ("Knology's Reply to Georgia Power's Response to Commission's Requests"); Georgia Power's Reply to Knology's Response to Commission's Requests. *See also* Limited Response of Knology, Inc. to Georgia Power Company's November 20, 2002 Reply, File No. PA-01-006 (filed Mar. 12, 2003) (addressing principally a bankruptcy issue Georgia Power raised for the first time in its November 20, 2002 filing); Reply of Georgia Power Company to Limited Response of Knology, Inc. to Georgia Power Company's November 20, 2002 Reply, File No. PA 01-006 (filed Mar. 19, 2003); Knology's Motion for

party sought leave to add additional information that it believed would aid our resolution of the dispute.

### III. DISCUSSION

#### A. We Reject Georgia Power's Procedural Objections to Resolution of the Complaint.

13. Georgia Power raises several procedural objections pertaining to the Commission's authority to resolve Knology's Complaint. Specifically, the Response argues that the Commission should dismiss the Complaint, because (1) the Commission lacks jurisdiction to resolve the dispute; (2) the dispute is unripe; and (3) the Complaint does not comply with the Commission's complaint rules.<sup>43</sup> Many months later, Georgia Power raised a fourth procedural objection, namely that the case should be stayed because of a bankruptcy filing made by Knology's subsidiary corporation, Knology Broadband, Inc. For the reasons set forth below, we reject all of Georgia Power's procedural arguments.

##### 1. The Commission Has Jurisdiction to Resolve the Complaint.

14. Georgia Power argues that, rather than challenging the reasonableness of a rate, term, or condition of access, the Complaint avers simply that Georgia Power violated the Agreement.<sup>44</sup> Consequently, according to Georgia Power, Knology's exclusive remedy is to seek a refund of overcharges in a state court contract action.<sup>45</sup> In other words, Georgia Power maintains that the Commission lacks jurisdiction to resolve this dispute. We disagree. Georgia Power misconstrues the nature of Knology's Complaint. Knology does not claim merely that Georgia Power has failed to comply with the terms of the Agreement. Rather, Knology challenges the reasonableness of Georgia Power's conduct (*e.g.*, double billing, failing properly to allocate costs, overcharging for a pole survey, charging unreasonable overhead expenses), irrespective of whether that conduct is purportedly authorized by the Agreement.<sup>46</sup> Thus, Knology's Complaint plainly concerns the reasonableness of rates, terms and conditions of attachment, which the Commission has jurisdiction to decide, regardless of the existence of an

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Leave to File Bankruptcy Court Order, File No. PA 01-006 (filed Apr. 1, 2003); Response of Georgia Power to Knology, Inc.'s Motion for Leave to File Bankruptcy Order, File No. PA 01-006 (filed Apr. 8, 2003) (not opposing motion for leave to file order).

<sup>43</sup> Response at 6-14.

<sup>44</sup> Response at 7.

<sup>45</sup> Response at 7.

<sup>46</sup> *See generally* Complaint at 31-33, ¶ 71.

agreement between the parties.<sup>47</sup> Accordingly, we reject Georgia Power's jurisdictional challenge.<sup>48</sup>

## 2. The Case Is Ripe for Resolution.

15. Georgia Power claims that the Commission should decline to entertain this case on two ripeness grounds. First, according to Georgia Power, Knology never engaged in good faith negotiations prior to filing the Complaint, because Knology did not present Georgia Power with the results of the Singleton Audit.<sup>49</sup> We believe Knology satisfied its obligations under the Commission's rules.

16. The pole attachment complaint rules apply "when parties are unable to arrive at a negotiated agreement . . . ."<sup>50</sup> Thus, section 1.1404(k) of the rules requires the complaint to include:

a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless.<sup>51</sup>

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<sup>47</sup> *Mile Hi Cable Partners v. Public Serv. Co. of Colo.*, Order, 17 FCC Rcd 6268, 6271 (2002) (rejecting a utility's argument that the state court had exclusive jurisdiction to resolve disputes concerning the rates, terms and condition of attachment contained in an agreement and affirming the Commission's exercise of jurisdiction, relying on section 224(b)(1) of the Act (providing the Commission with authority to regulate the rates, terms and conditions of attachment, 47 U.S.C. § 224(b)(1))), *review denied sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003); *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, Order, 16 FCCR 12209, 12217, ¶ 18 (2001) ("*Alabama Power*"), *review denied sub nom. Alabama Power Co. v. FCC*, 311 F.3d 1357 (11<sup>th</sup> Cir. 2002); *Texas Cable & Telecommunications Ass'n v. Entergy Servs.*, Order, 14 FCC Rcd 9138, 9142, ¶ 12 (Cable Serv. Bur. 1999) ("*Texas Cable*"). *See also Southern Co. Serv., Inc. v. FCC*, 313 F.3d 574, 583-84 (D.C. Cir. 2002) ("*Southern Company*") (affirming conclusion that attaching entities may sign a pole attachment agreement and later file a complaint with the FCC challenging an allegedly unfair element of the agreement).

<sup>48</sup> Georgia Power's reliance on two Bureau-level orders in support of its jurisdictional argument is misplaced. Response at 6-7. These orders did not hold that the Commission lacks jurisdiction to decide claims concerning alleged unjust or unreasonable rates, terms or conditions of attachment. *See Cable Texas, Inc. v. Entergy Servs., Inc.*, Order, 14 FCC Rcd 6647 (Cable Serv. Bur. 1999) ("*Cable Texas*"); *Marcus Cable Associates, L.P. v. Texas Util. Elec. Co.*, Declaratory Ruling and Order, 12 FCC Rcd 10362 (Cable Serv. Bur. 1997) ("*Marcus Cable*").

<sup>49</sup> Response at 9-10.

<sup>50</sup> *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12111, ¶ 10 (2001) ("*Consolidated Order*"), *review denied sub nom. Southern Company*, 313 F.3d at 574. *See* 47 U.S.C. § 224(k) (the Commission's regulations apply "when the parties fail to resolve a dispute over such charges").

<sup>51</sup> 47 C.F.R. § 1.1404(k).

In compliance with section 1.1404(k), the Complaint delineates Knology's efforts to negotiate with Georgia Power about the challenged make-ready practices.<sup>52</sup> These include correspondence seeking additional information regarding make-ready work, as well as a meeting with Knology that Georgia Power does not deny transpired.<sup>53</sup> The Complaint's description of Knology's pre-filing settlement efforts is sufficiently detailed to assure us that continued negotiations would have been fruitless. Moreover, contrary to Georgia Power's assertion,<sup>54</sup> the rules contain no requirement that a complainant present the results of statistical studies to the other side before filing a complaint. In any event, the Complaint indicates that the Singleton Audit was incomplete because Georgia Power refused to provide additional information Knology requested.<sup>55</sup> This alleged refusal is one of the very factors Knology relies upon in concluding that additional negotiations would have availed nothing.<sup>56</sup>

17. Second, Georgia Power argues that Knology's allegations are premature, because the parties have not yet undergone the "true-up" process to which they purportedly agreed.<sup>57</sup> Specifically, Georgia Power claims that it was to bill Knology on a monthly basis for estimated costs, and, at the conclusion of the make-ready project, Georgia Power was to reconcile estimated costs with actual costs.<sup>58</sup> Georgia Power then purportedly was to conduct a financial reckoning: estimated costs exceeding actual costs would obligate Georgia Power to pay Knology a refund; actual costs exceeding estimated costs would entitle Georgia Power to bill Knology the difference.<sup>59</sup>

18. Georgia Power has failed to substantiate the existence of the purported true-up agreement. Although Georgia Power submits two declarations ostensibly supporting its position, both declarants state simply that there was a meeting on March 27, 1998, and that, at the meeting, Knology agreed to be billed according to an estimate/true-up system.<sup>60</sup> Neither

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<sup>52</sup> Complaint at 5-6, ¶¶ 18-22; at 7, ¶ 25.

<sup>53</sup> Complaint at 5-6, ¶¶ 18-22; Response at 10 n.49.

<sup>54</sup> Response at 10.

<sup>55</sup> Complaint at 6, ¶¶ 22-23.

<sup>56</sup> Complaint at 7, ¶ 25.

<sup>57</sup> Response at 11.

<sup>58</sup> Response at 11.

<sup>59</sup> Response at 12. During mediation, Georgia Power indicated that it recently had completed the true-up process, and it subsequently filed the results of that process as part of its supplemental submission. *See* Georgia Power's Supplemental Information, Declaration of Greg Detwiler ("Detwiler Declaration"), Exhibit 3. According to Georgia Power, as of May 1, 2002, Knology owes an additional \$882,748.17 (plus interest) for work performed and actual costs incurred on the Augusta project. Supplemental Information, Detwiler Declaration at 3-4, ¶ 6.

<sup>60</sup> *See* Response, Exhibit 1 (Declaration of Marcus Mills ("Mills Declaration")) at 12, ¶ 29;

declarant states that he attended the meeting, however, or even that the statements made in his declaration are based upon personal knowledge. Furthermore, Georgia Power proffers no documentary evidence of the alleged true-up agreement. We find the absence of a written documentation to be especially probative given that Georgia Power memorialized in writing a different oral agreement it reached with Knology at the very same meeting.<sup>61</sup>

### 3. The Complaint Complies with the Commission's Rules.

19. Georgia Power contends that the Commission should dismiss the Complaint, because it does not comply with Commission rule 1.1404(l).<sup>62</sup> That rule requires factual allegations in a complaint to be “supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits . . . [to be] verified by the person who prepares them.”<sup>63</sup>

20. We find no such deficiency. With respect to exhibits, the “preparer” of a document is not synonymous with the “drafter” of a document. In his declaration, Chad S. Wachter, Vice President and General Counsel of Knology, states that he reviewed the Complaint’s exhibits and is “familiar with and [has] actual knowledge of the matters described therein.”<sup>64</sup> This is a sufficient attestation that Mr. Wachter was involved in the exhibits’ preparation. Moreover, to the extent Georgia Power validly objected to the Complaint’s discussion of the Singleton Audit without proper verification from Patrick Casey, the individual who conducted the inspections relating to pole change-outs, Knology remedied that problem by submitting a supplemental affidavit from Mr. Casey.<sup>65</sup>

21. Georgia Power also claims that the Complaint fails to comply with Commission rule 1.363, which governs the “Introduction of Statistical Data.”<sup>66</sup> We decline to hold Knology to the standard of that rule in this case. Mr. Singleton, who conducted Knology’s “independent audit,” states that he had “very limited information at hand,” because of Georgia Power’s

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Response, Exhibit 2 (Declaration of Thomas Jackson (“Jackson Declaration”)) at 9, ¶ 20; at 10, ¶ 22.

<sup>61</sup> See Reply, Exhibit 2 (Letter dated May 11, 1998 to Bret McCants, Knology, from J. Darryll Wilson, Georgia Power) (memorializing Knology’s authorization of the addition of a project manager and a senior inspector to the project).

<sup>62</sup> Response at 12-13.

<sup>63</sup> 47 C.F.R. § 1.1404(l).

<sup>64</sup> Complaint, Affidavit and Verification of Chad S. Wachter (“Wachter Affidavit”) at 5, ¶ 10.

<sup>65</sup> See Reply, Affidavit of Patrick Casey (“Casey Affidavit”) at 2, ¶ 5.

<sup>66</sup> Response at 13-14; 47 C.F.R. § 1.363. See *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, 45 Rad. Reg. 2d (P&F) 1005, ¶ 21 & n.24 (1979) (allowing for application of Rule 1.363 in pole attachment proceedings).

unwillingness to produce field notes.<sup>67</sup> According to Mr. Singleton, Georgia Power's refusal to provide the requested information prevented him from undertaking as comprehensive an audit as he would have desired.<sup>68</sup> We decline Georgia Power's request that we reject the Complaint because the accompanying audit is purportedly unreliably deficient when Georgia Power is itself largely responsible for any such deficiencies.

#### 4. Georgia Power's Bankruptcy-Related Arguments Fail.

22. Georgia Power argues that we should stay this proceeding in light of a bankruptcy filing by Knology's subsidiary during the pendency of this proceeding.<sup>69</sup> Georgia Power contends that, under the plan of reorganization filed by Knology's subsidiary, issues related to the parties' Agreement are to be resolved by the bankruptcy court or Georgia state court.<sup>70</sup> Shortly after Georgia Power raised this argument, however, the bankruptcy court issued an order making clear that the plan of reorganization did not prohibit Knology from pursuing its claims in this proceeding.<sup>71</sup> Accordingly, we deny Georgia Power's request that we stay this proceeding.

23. In the same pleading in which it poses its bankruptcy arguments, Georgia Power raises an additional, new contention. Georgia Power argues that Knology is not the proper complainant because the disputed Agreement was entered into between Knology's subsidiary and Georgia Power.<sup>72</sup> Georgia Power, however, did not raise this argument in its Response to the Complaint and fails to explain why it did not include this argument in its Response. In fact, Georgia Power waited until its final authorized submission in this proceeding – a submission to which Knology had no automatic right to respond – to raise this argument. Accordingly, the argument is untimely, and we reject it.<sup>73</sup>

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<sup>67</sup> Complaint, Singleton Affidavit at 11, ¶ 22.

<sup>68</sup> Complaint, Singleton Affidavit at 19, ¶ 37.

<sup>69</sup> Georgia Power's Reply to Knology's Response to Commission's Requests at 2-3.

<sup>70</sup> Georgia Power's Reply to Knology's Response to Commission's Requests at 2-3.

<sup>71</sup> See Motion for Leave to File Bankruptcy Court Order at Exhibit A (bankruptcy court order concluding, at page 2, that "the provisions of the plan [of reorganization] do not preclude Knology or Broadband from the continued prosecution of the complaint filed on November 21, 2001 and currently pending before the Federal Communications Commission . . .").

<sup>72</sup> Georgia Power's Reply to Knology's Response to Commission's Requests at 2-3.

<sup>73</sup> See *supra* at note 16 (discussing orders in which we have declined to consider arguments raised for the first time in briefs filed late in a proceeding).

**B. Knology's Challenges to Georgia Power's Charges and Practices are Granted in Part and Denied in Part.**

24. Having concluded that there are no procedural impediments to resolution of Knology's claims that Georgia's Power conduct has been unreasonable, we move now to the specific claims Knology raises.

### 1. We Grant in Part and Deny in Part Knology's Double Billing Claim.

25. Knology claims that Georgia Power billed for the correction of errors caused by its own engineering contractors during the performance of make-ready work.<sup>74</sup> As indicated above, according to Knology, Georgia Power prohibits Knology from performing its own construction on Georgia Power's poles, but instead requires the use of two Georgia Power contractors, UCI and USS, which perform first (*i.e.*, before make-ready work) and second (*i.e.*, after make-ready work) pole inspections, respectively.<sup>75</sup> Knology avers that, because USS does not receive UCI's notes, USS has no way of knowing what recommendations UCI made and, therefore, cannot tell whether attachments need to be modified as a result of UCI's recommendations or as a result of another attacher failing to comply with UCI's recommendations.<sup>76</sup> Knology contends that, as a result of this system, second-round engineering recommendations often end up reversing or modifying incorrect first-round engineering recommendations.<sup>77</sup> Moreover, Knology alleges that Georgia Power billed Knology twice for construction that was performed only once, as evidenced by the fact that second-round "NJUNS" tickets frequently contain instructions that are identical to first-round "NJUNS" tickets.<sup>78</sup>

26. We grant this claim to the extent that Knology paid for duplicative or unnecessary engineering work after June 8, 2001.<sup>79</sup> Utilities are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work. Knology identifies 53 examples of engineering errors or duplicate charges that it was allegedly unreasonably forced to pay.<sup>80</sup> Georgia Power responds that at least 29 of those 53 examples were the fault of Knology.<sup>81</sup> Thus, Georgia Power appears to concede that at least some of Knology's engineering error and double billing examples have merit. We cannot determine from the record, however, whether Knology paid Georgia Power any amounts after June 8, 2001 for any of the purported incidents of engineering error or double-billing. Thus, we order Georgia Power to refund to Knology amounts Knology paid after June 8, 2001 for

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<sup>74</sup> Complaint at 7, ¶ 26.

<sup>75</sup> Complaint at 8 n.14.

<sup>76</sup> Complaint at 8 n.14.

<sup>77</sup> Complaint at 9, ¶ 28.

<sup>78</sup> Complaint at 9, ¶ 29. NJUNS stands for National Joint Use Notification System. Complaint at 9, ¶ 28.

<sup>79</sup> As explained *infra* at section III(B)(5), Knology has not established an entitlement to refunds for amounts paid before June 8, 2001 for alleged unreasonable conduct.

<sup>80</sup> Complaint, Exhibit 5.

<sup>81</sup> Response, Jackson Declaration at 14, ¶ 32 and Exhibit A.

unnecessary or duplicative engineering work or engineering errors which Knology did not cause and order Georgia Power to cease and desist from further unreasonable engineering and billing practices.

27. Further, we deny this claim to the extent that it seeks recovery of amounts paid prior to June 8, 2001, because we do not believe that Knology adequately preserved its right to refunds for these charges prior to that point in time.<sup>82</sup> Knology claims that it should receive refunds for amounts paid prior to June 8 because it could not have detected UCI's errors (1) prior to "post-inspection" (when first- and second-round engineering recommendations could be compared) and, even then, (2) without the benefit of Georgia Power's field notes to evaluate the requests.<sup>83</sup> As discussed in more detail at Section III(B)(5), however, the record does not support Knology's assertions.<sup>84</sup>

**2. Georgia Power Unreasonably Charged Knology the Entire Cost of Inspecting Knology's Attachments One Year or More After the Attachments Were Installed.**

28. Knology maintains that Georgia Power (through its subcontractor, USS) improperly billed Knology for the full cost of a routine "pole survey" (*i.e.* post-attachment inspection).<sup>85</sup> The post-attachment inspection purportedly occurred on a rolling (*i.e.*, pole-by-pole) basis one to two years after Knology's attachments were installed, which Knology alleges constitutes an unreasonable delay. Specifically, Knology claims that the passage of over a year before the performance of a post-attachment inspection "allow[ed] too much time and activity on a pole to occur to offer a meaningful evaluation of whether additional work related to Knology's

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<sup>82</sup> See *infra* at section III(B)(5). Section 1.1410(c) specifies that refunds will "normally" be calculated "from the date that the complaint, as acceptable, was filed . . ." 47 C.F.R. § 1.1410(c).

<sup>83</sup> Reply at 18.

<sup>84</sup> See *infra* at section III(B)(5). See generally Complaint, Singleton Affidavit at 7-8, ¶ 12 (discussing opportunities for Knology to identify and raise make-ready concerns, including regular opportunities to review and comment on initial engineering recommendations); Reply, Reply Affidavit of Jeffery L. Barnett ("Barnett Reply Affidavit") at 3, ¶ 6 (explaining that many of the errors or duplications about which Knology complains were the result of lack of initial measurements or vague make-ready recommendations (which we believe could have been detected at an early stage)). Notwithstanding Knology's contemporaneous opportunities to challenge engineering recommendations and seek additional information concerning make-ready practices, Knology did not raise questions or ask for additional information concerning make-ready charges until June 8, 2001. As explained *infra* at section III(B)(5), this failure by Knology, when considered with the general rule that entitlement to refunds begins the date the complaint is filed, leads us to conclude that Knology is not entitled to refunds beyond June 8, 2001.

<sup>85</sup> Complaint at 12, ¶ 34. Georgia Power contends there is no such thing as a "general pole survey." Georgia Power's Response to Commission's Requests at 8. Although Knology uses the word "survey," we believe the phrase post-attachment "inspection" more accurately reflects the activity at issue in this part of our Order.

attachments is warranted.”<sup>86</sup> Knology does not challenge the reasonableness of the cost of the inspection. Rather, it contends that Georgia Power improperly has deemed the inspection to be related to Knology’s attachments (for which Georgia Power has billed Knology) instead of a routine inspection (for which Georgia Power charges all attachers through the carrying cost component of the annual pole attachment fee).<sup>87</sup> According to Knology, under the Agreement and the Commission’s orders, all attachers (not just Knology) should bear the cost of an inspection that yields information about more than one cable company’s attachments.<sup>88</sup>

29. The “cost of an inspection of pole attachments should be borne solely by the cable company, if and only if, cable attachments are the sole ones inspected and there is nothing in the inspection to benefit the utility or other attachers to the pole.”<sup>89</sup> If an inspection is “designed to yield information about more than cable attachments, and thus to benefit other pole users,” the cable company should not be required to bear the cost exclusively.<sup>90</sup> In other words, the costs of a pole inspection unrelated to a particular company’s attachments should be borne by all attachers.

30. As an initial matter, Georgia Power contends that Knology is challenging only the fact that Georgia Power *billed* for the inspection long after it was conducted, and is not alleging that the inspection actually was *conducted* in an untimely manner.<sup>91</sup> This is an unfair reading of Knology’s claim.<sup>92</sup> In any event, Georgia Power offers no evidence that the inspection in fact took place more quickly than Knology contends. To the contrary, Georgia Power’s witness with regard to this issue, Marcus Mills, admits that “some [of the post-attachment inspection] occurred one to two years after the date make-ready work was completed on the poles.”<sup>93</sup> Further, Georgia Power attempts to support its argument that the pole inspections were conducted in a timely manner by asserting that its inspectors inspected one pole every ten minutes.<sup>94</sup> This assertion, however, is not supported by Mr. Mills’ declaration. Mr. Mills

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<sup>86</sup> Complaint at 11, ¶ 34.

<sup>87</sup> Complaint at 11-12, ¶ 34.

<sup>88</sup> Complaint at 12-13, ¶¶ 35-36.

<sup>89</sup> *Cable Texas*, 14 FCC Rcd at 6652, ¶ 13 (citing *Newport News Cablevision, Ltd. v. Virginia Power*, Order, 7 FCC Rcd 2610, 2614, ¶ 9 (Com. Car. Bur. 1992)).

<sup>90</sup> *First Commonwealth Communications v. Virginia Elec. & Power Co.*, Order, 7 FCC Rcd 2614, 2615, ¶ 8 (Com. Car. Bur. 1992).

<sup>91</sup> Response at 20.

<sup>92</sup> See Complaint at 11, ¶ 34 (“[T]his pole *survey* typically *occurred* one to two years after the Knology attachments were installed.”) (emphasis added).

<sup>93</sup> Response, Mills Declaration at 10, ¶ 23. Mr. Mills further describes this as a “one to two year delay.” *Id.*

<sup>94</sup> Response at 19.

merely states that each inspection of a pole is “*usually* very quick,” and that it is “*possible* to inspect a pole every ten minutes.”<sup>95</sup> He does not state that the inspection in fact took place at that pace. Indeed, Knology produces evidence indicating that the inspection actually took much longer than ten minutes per pole.<sup>96</sup> Regardless, Georgia Power’s response does not address the issue of *how quickly* the inspection occurred following the completion of construction, but just addresses the speed of inspecting each pole.

31. After challenging Knology’s allegations regarding untimely inspection, Georgia Power quickly turns its attention to placing blame for the delays. First, Georgia Power claims that the inspection took a longer than normal time because the parties agreed to engage one to two, rather than eight to ten, inspectors.<sup>97</sup> Georgia Power proffers no written evidence of such an agreement, and the one declarant who testifies in general terms about the purported agreement does not make his assertions based on personal knowledge.<sup>98</sup> Moreover, Knology denies that such an agreement exists.<sup>99</sup> In light of this record, we cannot credit Georgia Power’s assertion regarding the number of inspectors.<sup>100</sup>

32. Next, Georgia Power claims that Knology was responsible for “*some* of the inspection delays,” because it failed to provide necessary node maps.<sup>101</sup> Even assuming this is correct, and Knology takes the contrary position,<sup>102</sup> Georgia Power fails to explain the remainder of the delays that were not attributable to Knology.<sup>103</sup>

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<sup>95</sup> Response, Mills Declaration at 9, ¶ 22 (emphasis added).

<sup>96</sup> See Reply, Reply Affidavit of Brett McCants (“McCants Reply Affidavit”) at 4, ¶ 10 (“The shortest average duration of inspection time that I found was just over 32 minutes per pole . . .”).

<sup>97</sup> Response, Mills Declaration at 9, ¶ 22.

<sup>98</sup> Response, Mills Declaration at 9, ¶ 22.

<sup>99</sup> Reply, Casey Affidavit at 5, ¶ 14; Reply, Reply Affidavit of Wayne Singleton (“Singleton Reply Affidavit”) at 2, ¶ 5; Reply, McCants Reply Affidavit at 2, ¶ 4; Reply, Reply Affidavit and Verification of Chad S. Wachter (“Wachter Reply Affidavit”) at 1, ¶ 3.

<sup>100</sup> Cf. *Echostar Communications Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002) (Commission appropriately could rely on unconstested, sworn affidavit of witness with personal knowledge).

<sup>101</sup> Response at 20 (emphasis added).

<sup>102</sup> Reply at 21.

<sup>103</sup> Georgia Power claims that Knology suffered no damage as a result of any delay, because no other attachers attached to the poles between the time that Knology attached to the poles and Georgia Power inspected the poles. Response at 19-20. Testimony from Georgia Power’s own declarant contradicts this unequivocal assertion. See Response, Mills Declaration at 10-11, ¶ 24 (“However, in this case, *except on one road in the Knology Project*, there were no attachers after Knology.”) (emphasis added). In any event, Georgia Power’s argument is irrelevant. If (as we conclude) the inspection was not specific to Knology’s attachments, then Knology cannot be held responsible for the total cost, regardless of whether other attachers installed their cables and equipment on Georgia

33. Finally, Georgia Power admits that at least some of the post-attachment inspection work benefited entities other than Knology. Mr. Jackson notes that, during the post-attachment inspections, the contractor “identified third-party safety violations” and Georgia Power then “notified the third party and required that third-party to correct the violation at its own cost.”<sup>104</sup> Such an exercise plainly benefited the attachers who brought their attachments into compliance with applicable safety guidelines and benefited the pole owner as well by eliminating safety violations on the inspected poles.

34. In light of the foregoing, we conclude that the post-attachment inspection of Knology’s attachments occurred (at least in part) more than one year after Knology installed its cables and equipment on Georgia Power’s poles.<sup>105</sup> We further conclude, based on the record in this case, that Georgia Power’s post-attachment inspection was not related solely to Knology’s attachments but, instead, constituted a routine inspection. Specifically, we do not believe that Georgia Power adequately demonstrated that, notwithstanding the fact that it took Georgia Power more than a year to conduct the post-attachment inspection, the inspection nevertheless related solely to Knology’s attachments.<sup>106</sup> Indeed, Georgia Power actually concedes, as described above, that the post-attachment inspection did not, in fact, solely concern Knology’s attachments but also involved identification and correction of other attachers’ safety violations.<sup>107</sup>

35. Consequently, we find that charging Knology the cost of a post-attachment inspection occurring one year or more after installation of Knology’s equipment is an unreasonable term and condition of attachment. We further conclude that Knology should not be required to pay, after June 8, 2001, for post-attachment inspections that took place more than one year after the attachments were completed.<sup>108</sup> The parties have not advised us which of the charges that Knology paid after June 8, 2001 related to post attachment inspections occurring less than one year after attachment. Therefore, we direct the parties to resolve this issue in accordance with the guidance provided in this order.

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Power’s poles after Knology.

<sup>104</sup> Response, Jackson Declaration at 12, ¶ 28.

<sup>105</sup> See, e.g., *supra* at Paragraph 30 and n.93.

<sup>106</sup> Georgia Power argues that a year-long delay prior to the post-attachment inspection “allows for final line sag and pole settling to occur at least one full cycle of seasons.” Response at 19 n.87; *Id.*, Declaration of Michael E. Davis (“Davis Declaration”) at 3, ¶ 8. This statement, however, is not supported by evidence of industry-wide practices, or proof that Georgia Power applies this standard to all attachers on its poles.

<sup>107</sup> Response, Jackson Declaration at 12, ¶ 28.

<sup>108</sup> See section III(B)(5) *infra* (finding that Knology is entitled to a refund for amounts it paid after June 8, 2001).

### 3. Georgia Power Improperly Failed to Allocate Among All Attachers Certain Common Costs.

36. Knology claims that Georgia Power failed to allocate among all attachers various individual and common costs. In particular, Knology contends that Georgia Power improperly billed Knology to correct safety violations caused by other attachers that existed prior to the commencement of Knology's make-ready work, including the replacement of poles,<sup>109</sup> and charged Knology the entire cost of a "from scratch" pole survey conducted prior to the commencement of Knology's make-ready work.<sup>110</sup>

37. With respect to safety violations caused by other attachers, Georgia Power makes a three-part argument. First, Georgia Power maintains that Knology agreed to pay for pole change-outs regardless of the reason necessitating the change (*i.e.*, a problem caused by Knology or a problem caused by another attacher).<sup>111</sup> Georgia Power cites no evidence of such an agreement by Knology. Consequently, we cannot find that an agreement exists. Absent such an agreement, attained via arms-length negotiations, it is an unjust and unreasonable term and condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers' safety violations.<sup>112</sup>

38. Second, Georgia Power contends that Knology improperly seeks to avoid the cost of pole replacements that are necessary to correct safety violations caused *solely* by the fact that an additional attachment renders the pole non-compliant.<sup>113</sup> Georgia Power misstates Knology's position: Knology objects only to pole change-outs that need to be performed whether or not Knology attaches to the pole.<sup>114</sup> Consequently, Georgia Power's argument fails.<sup>115</sup>

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<sup>109</sup> Complaint at 15-16, ¶ 40.

<sup>110</sup> Complaint at 14, ¶ 37.

<sup>111</sup> Response at 21-22.

<sup>112</sup> See *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599, 11606-07, ¶ 19 (Cable Serv. Bur. 1999) ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.").

<sup>113</sup> Georgia Power's Response to Commission's Requests at 4-5.

<sup>114</sup> Knology's Reply to Georgia Power's Response to Commission's Requests at 10 & n.30.

<sup>115</sup> Georgia Power argues that, should the Commission award a refund relating to pole replacements, it should favor the "incremental cost allocation" (*i.e.*, requiring the existing attacher to pay the cost of rearranging its attachments on a pole if Knology were not an attaching entity) that Georgia Power proposes, rather than the "proportional cost allocation" (*i.e.*, requiring each attacher to pay its *pro rata* share of replacement costs) that Knology proposes. Georgia Power's Response to Commission's Requests at 4-5. Again, Georgia Power misapprehends Knology's argument, which is that it should not be forced to bear the entire cost of pole change-outs

39. Third, Georgia Power contends that Knology should be required to bear the cost of remedying safety violations on poles that are “grandfathered” by the National Electrical Safety Code (“NESC”).<sup>116</sup> Specifically, NESC Section 013.B.2. provides that “[e]xisting installations, including maintenance replacements, that currently comply with prior editions of the Code, need not be modified to comply with these rules except as may be required for safety reasons by the administrative authority.”<sup>117</sup> Georgia Power contends that, in “common industry practice,” corrections to grandfathered poles are considered to be “required by or necessitated by the new attacher – *i.e.*, Knology.”<sup>118</sup> Any cost allocation other than the “simple” approach of requiring Knology to pay for pole corrections, Georgia Power argues, would require it and other utilities to conduct an historical inquiry to determine when each prior attachment was affixed and whether, at that time, the attachment complied with the NESC.<sup>119</sup> We find this argument to be unavailing. Georgia Power’s contentions are based purely on speculation – *i.e.*, that there is some, presumably a large, percentage of its poles where attachments are out of compliance but are nevertheless protected by the NESC grandfathering provision. The record is devoid of evidence demonstrating the existence of such a problem.<sup>120</sup>

40. Having rejected Georgia Power’s defenses regarding pole change-outs, we order Georgia Power to refund Knology the costs of any change-outs necessitated by the safety violations of other attachers for which Knology paid after June 8, 2001.<sup>121</sup> In its Complaint,

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that are required “only when a pre-existing safety violation could not have been corrected without a pole replacement.” Knology’s Response to Commission’s Requests at 10. In any event, we have determined a reasonable allocation based on information in the record. *See infra* paragraphs 40-41.

<sup>116</sup> Georgia Power’s Response to Commission’s Requests at 4.

<sup>117</sup> National Electrical Safety Code C2-2002 Section 013.B.2.

<sup>118</sup> Georgia Power’s Response to Commission’s Requests at 4.

<sup>119</sup> Georgia Power’s Response to Commission’s Requests at 4.

<sup>120</sup> Moreover, Knology argues persuasively that there have been no material changes to the NESC in the last ten years and that Georgia Power, accordingly, would have detected any grandfathered poles during the safety inspection it conducts on a ten-year basis. Knology’s Reply to Georgia Power’s Response to Commission’s Request at 8. Consequently, even if Georgia Power is correct about the existence of grandfathered poles, the cost of identifying them would not be as great as Georgia Power posits.

<sup>121</sup> Knology alleges that, “[w]ith respect to non-change-out work,” Georgia Power has a “policy not to allocate costs among attachers.” Complaint at 16, ¶ 41. Knology asks the Commission to declare that such a practice is unfounded and to order Georgia Power, on a prospective basis, to bill other attachers proportionately for their share of the costs of curing violations. Complaint at 32, ¶ 72. Georgia Power, however, denies that it engages in this practice, and the record does not contain anything beyond the Complaint’s assertion to suggest the contrary. *See* Response, Jackson Declaration at 11, ¶ 24 (“each existing attacher has been required to correct its own safety violations and perform its own make-ready work” and Georgia Power “has not invoiced Knology for any such work”) and ¶ 28 (Georgia Power “identified third-party safety violations” and “notified the third-party and required that third-party to correct the violation at its own cost.”).

Knology calculates that it paid all costs required to replace over 962 Georgia Power poles, at a cost of \$2,146 per pole, purportedly to make room for Knology's attachments.<sup>122</sup> Of this number, the Singleton Audit estimates that approximately 30 percent were replaced in order to correct existing safety violations.<sup>123</sup> Georgia Power takes issue with the manner by which Knology calculates the percentage of pole change-outs attributable to other attachers, complaining that Mr. Singleton (1) improperly attested to a visual inspection conducted by someone else; and (2) failed to explain what poles were examined, how those poles were selected, and how a visual inspection could have been conducted before the poles were replaced.<sup>124</sup> In our view, Knology adequately has addressed Georgia Power's concerns regarding the accuracy of its estimate. First, attached to Knology's Reply is the Affidavit of Patrick Casey. According to the Casey Affidavit, Mr. Casey and his employees "visually inspected each pole for which Georgia Power issues a change-out order."<sup>125</sup> Moreover, Mr. Casey's affidavit explains that these pole inspections were conducted *prior* to the actual change-out (*i.e.*, during the two-week period Georgia Power gave Knology to review and concur with change-out orders).<sup>126</sup> Although we can dismiss a complaint that "does not contain substantially all the information required under § 1.1404" (including the requirement that factual allegations be supported by affidavit of a person with actual knowledge of the facts), we alternatively may require the complainant to file additional information.<sup>127</sup> Mr. Casey's affidavit is tantamount to supplemental information.

41. Although Georgia Power attempts (unsuccessfully) to discredit the Singleton Affidavit, it fails utterly to provide its own, competing estimate of the percentage of pole change-outs performed due to a third party's safety violations. As a result, we accept Knology's 30-percent figure. Between June 8, 2001 and the filing of the Complaint, Knology states that it paid invoices relating to the replacement of 54 Georgia Power poles.<sup>128</sup> Multiplying 54 poles by 30 percent results in approximately 16 poles. Multiplying 16 poles by \$2,146 per pole results in \$34,336. Consequently, we order Georgia Power to refund Knology \$34,336 for improperly assessed pole change-out charges.<sup>129</sup> In addition, Georgia Power must refund to Knology any

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<sup>122</sup> Complaint at 15, ¶ 40. Georgia Power does not dispute this figure. See Response, Jackson Declaration at 7, ¶ 15 ("Replacing a typical pole costs approximately \$2,000.").

<sup>123</sup> Complaint at 16, ¶ 40.

<sup>124</sup> Response at 22.

<sup>125</sup> Casey Affidavit at 2, ¶ 4.

<sup>126</sup> Casey Affidavit at 2, ¶ 4.

<sup>127</sup> 47 C.F.R. § 1.1406(b).

<sup>128</sup> Knology's Response to Commission's Requests at 10. Georgia Power appears not to dispute this figure. See Georgia Power's Reply to Knology's Response to Commission's Requests at 15-17.

<sup>129</sup> Finally, Georgia Power "renews" a request – first made after the conclusion of the initial pleading cycle during mediation of this proceeding – that "any other attachers whom [the Commission] believes owe

overhead amounts paid by Knology that were associated with the 16 pole replacements for third-party safety violations that were paid by Knology.<sup>130</sup>

42. Turning now to the issue of the pre-make-ready inspection costs, we believe that Georgia Power has not appropriately allocated the cost of that inspection work.<sup>131</sup> While we agree with Georgia Power that it must ascertain “where and how Knology should attach in a manner compliant with safety codes,”<sup>132</sup> we are troubled by Georgia Power’s imposition of the entire cost of that endeavor on Knology. Georgia Power initially claims that it “does not have records detailing the identities and locations of attaching entities and is therefore unable to provide this information [to Knology].”<sup>133</sup> In its supplemental submission, Georgia Power refines its objection, arguing that it does not maintain records detailing “where each attacher is on each pole to the inch.”<sup>134</sup> Knology does not contend that Georgia Power should have had in its possession, and provided to Knology, this type of specific information.<sup>135</sup> Rather, Knology asserts that Georgia Power could have saved Knology the costs of ascertaining some very basic information regarding Georgia Power’s pole network – such as the characteristics of the poles themselves or the identities of other attachers (regardless of the exact location/condition of attachments) – which undoubtedly was in Georgia Power’s possession.<sup>136</sup> Georgia Power never credibly refutes Knology’s claim. Indeed, Georgia Power states that it requires all attachers — not just Knology — to identify and locate other attachers on the pole.<sup>137</sup> Assuming that is the case, Georgia Power does not explain why it has no records at all relating to the attachments on its poles. If Georgia Power once had the records but did not keep them, it similarly fails to offer such an explanation.

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Knology reimbursement for make ready costs be added as necessary parties to this proceeding.” Georgia Power’s Response to Commission’s Requests at 5. We deny this request, because, in addition to being untimely made, we do not believe, given the record, that the addition of parties is necessary.

<sup>130</sup> The record does not contain the information necessary to calculate this amount, or even to determine whether an overhead component was charged Georgia Power for this work. We encourage the parties to resolve this issue privately.

<sup>131</sup> Again, we opt to use the word “inspection,” rather than “survey,” because the former word, in our view, more accurately describes the activity at issue.

<sup>132</sup> Response at 20.

<sup>133</sup> Response at 21.

<sup>134</sup> Georgia Power’s Response to Commission’s Requests at 8.

<sup>135</sup> Knology’s Reply to Georgia Power’s Response to Commission’s Requests at 15 (“Knology does not dispute that field inspection and engineering must occur nor does it quarrel with the need for pole measurements.”).

<sup>136</sup> Knology’s Reply to Georgia Power’s Response to Commission’s Requests at 16-17.

<sup>137</sup> Response at 21.

43. Further, we reject Georgia Power's assertion that Knology should pay the entire cost of the pre-make-ready inspections, because Knology was purportedly the sole beneficiary of the inspections. Although Georgia Power claims that it derived no benefit from the pre-attachment inspections,<sup>138</sup> this assertion by counsel finds no evidentiary support in the record. Moreover, it strains credulity to say that information regarding the identity of attachers and the location of attachments that is gathered in connection with a make-ready project of the magnitude of Knology's (encompassing some 20,000 poles) would be of absolutely no value to Georgia Power. Additionally, Georgia Power acknowledges the likelihood that other attachers benefited from the pre-make-ready inspections.<sup>139</sup> Thus, we reject Georgia Power's assertion that Knology is responsible for one-hundred percent of the pre-attachment inspection costs.

44. Having determined that Knology should not be responsible for one-hundred percent of the pre-make-ready inspection costs, we turn now to the question of the percentage for which Knology should be responsible. The record offers us a method for determining a reasonable allocation of the pre-make-ready inspection costs. As discussed above, Knology argues that 30 percent of the pole change-outs charged to Knology was due to pre-existing safety violations caused by other attachers.<sup>140</sup> It is reasonable to conclude that pre-existing safety violations existed on poles that did not require change-out to the same degree as they existed on poles that did require change-out. In other words, if 30 percent of the inspected and replaced poles revealed pre-existing safety violations caused by other attachers, then one would reasonably expect that other attachers also caused pre-existing safety violations on 30 percent of those poles which did not require replacement.<sup>141</sup> Accordingly, we conclude, based on the discrete record in this proceeding, that Knology is responsible for 70 percent of the pre-make-ready inspection costs it paid to UCI after June 8, 2001.<sup>142</sup> Therefore, Knology is entitled to a

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<sup>138</sup> Georgia Power's Reply to Knology's Response to Commission's Requests at 12-13. *See also* Georgia Power's Supplemental Information, Detwiler Declaration at 4, ¶ 8.

<sup>139</sup> *See* Georgia Power's Reply to Knology's Response to Commission's Requests at 13 (acknowledging that "some pre-existing safety violations may be remedied by the make ready process" but disputing that this benefit is more than minor or incidental).

<sup>140</sup> Casey Affidavit at 3, ¶ 8.

<sup>141</sup> Although we might have reached a different conclusion or calculation based on a different record, the record here does not offer a persuasive, reasonable alternative. Although Georgia Power argues that the make-ready process identified only minor or incidental pre-existing safety violations caused by other attachers, it fails to quantify the percentage of these pre-existing violations. *See* Georgia Power's Reply to Knology's Response to Commission's Requests at 13. Thus, in the absence of evidence demonstrating that the approach we take here is unreasonable, or that a different analysis is more appropriate, we adopt the approach described herein. *See Georgia Power v. FCC*, 346 F.3d 1033, 1042 (11<sup>th</sup> Cir. 2003) (upholding the Commission's reasonable exercise of its judgment in adopting a pole attachment rate element when the parties did a poor job developing a record on the issue).

<sup>142</sup> Knology argues that it should be responsible for only one-fourth of the pre-make-ready inspection costs on the theory that the costs should be spread evenly among all attachers and there is an average of four

refund of 30 percent of the amounts it paid to UCI after June 8, 2001 (\$57,756.28) – or \$17,326.88.

#### 4. A Portion of Georgia Power's Make-Ready Overhead Charges and Surcharges is Unreasonable.

45. Knology alleges that Georgia Power billed for unreasonable expenses and overhead charges, including equipment that is useful not only to Knology's attachments but to maintenance of Georgia Power poles generally,<sup>143</sup> and an across-the-board overhead surcharge that purportedly overlaps with individual charges.<sup>144</sup> Knology requests a refund of overhead charges and surcharges that Georgia Power cannot justify.<sup>145</sup>

46. As a threshold matter, we reject Georgia Power's argument that overhead costs are subject to a later adjustment in accordance with a true-up agreement. As discussed above,<sup>146</sup> Georgia Power has failed to substantiate its claim that there was a true-up agreement, and accordingly we do not rely on any such agreement.<sup>147</sup> Similarly, Georgia Power's contention that Knology agreed to pay "whatever expense was necessary to facilitate Knology's attachment" similarly lacks any record support.<sup>148</sup> The letter Georgia Power cites memorializes Knology's "verbal request and authorization for [Georgia Power's] crews working overtime. . . ."<sup>149</sup> It does not constitute *carte blanche* for Georgia Power to incur any and every expense. We now turn to two categories of overhead costs – direct overhead costs and indirect overhead costs.

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attachers on Georgia Power's poles. Complaint at 12, ¶ 34 & Exhibit 7. Knology fails, however, adequately to (1) support its contention that pre-make-ready costs should be allocated evenly among all attachers; (2) explain how this allocation is consistent with its proposed allocation of pole replacement costs; and (3) support its proposed average number of attachers.

<sup>143</sup> Complaint at 19, ¶ 47.

<sup>144</sup> Complaint at 20, ¶ 48.

<sup>145</sup> Complaint at 20, ¶ 49. Knology concedes that Georgia Power is permitted to recover a reasonable overhead charge. See Knology's Response to Commission's Requests at 10.

<sup>146</sup> See Section III(A)(2), *supra*.

<sup>147</sup> Georgia Power asserts that Knology is responsible for \$72,596.55 in additional expenses. Georgia Power's Response to Commission's Requests at 12. Apparently, these are charges that have not been billed to Knology, but came to light during the purported "true-up." Remarkably, Georgia Power refuses or otherwise fails to categorize or identify these charges, even as it argues that Knology is responsible for all "actual costs." In any event, because Georgia Power has failed to establish that a true-up agreement exists, we disallow these charges to the extent that they are not already disallowed elsewhere in this Order.

<sup>148</sup> Response at 23.

<sup>149</sup> Response, Mills Declaration, Exhibit A (Letter dated February 10, 1999 from Marc A. Mills, Georgia Power, to Robert R. Bailey, Regional Construction Director, Knology).

**a. Direct Overhead Costs**

47. It is undisputed that the parties agreed to dedicate two full-time Georgia Power employees to the project at Knology's expense.<sup>150</sup> According to Georgia Power, by entering into the agreement, Knology implicitly "agreed to pay the employees' salaries, benefits and all overhead costs, including trucks, radios, and training classes."<sup>151</sup> In its Reply, Knology does not object to paying the salaries and benefits of the two employees who were dedicated to the Augusta Project.<sup>152</sup> Accordingly, we find that Knology is responsible for the two dedicated employees' salaries and benefits, including (but not limited to) bonuses, raises, health insurance costs, workers compensation, and payroll taxes, for the time period during which they were exclusively assigned to the Augusta project.

48. We further conclude that Knology is responsible for paying the entire cost of equipment associated with the work of "dedicated" employees. Knology does not dispute that it agreed to pay the costs of equipment and materials utilized by the Georgia Power employees dedicated to the Augusta project.<sup>153</sup> Rather, Knology contends that, under Commission precedent, equipment that is useful to the utility generally (*i.e.*, not just on the Augusta project) should not be billed entirely to Knology.<sup>154</sup> The Order Knology cites, however, was a rulemaking proceeding that did not address the situation where parties specifically agreed about how they would bill costs of equipment utilized by "dedicated" employees. Therefore, we find the decision to be inapplicable.

49. With its Complaint, Knology submitted a spreadsheet entitled "Estimated Costs Based on Paid Invoices," which lists, *inter alia*, amounts Knology paid that correspond to various journals (*i.e.*, accounts).<sup>155</sup> According to Mr. Singleton, Georgia Power refused to provide Knology with information prior to the filing of the Complaint regarding the "definitions of journal items and the source of the charges," which resulted in an incomplete "audit."<sup>156</sup> Although Georgia Power provided some explanation of these accounts during the course of this proceeding, Knology objects to the fact that Georgia Power uses Knology's "good faith and

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<sup>150</sup> Response at 2-3; Response, Jackson Declaration at 3-4, ¶ 6; Response, Mills Declaration at 3-4, ¶¶ 5-6; Reply at 12-13; Reply, Exhibit 2.

<sup>151</sup> Response at 2-3; Response, Jackson Declaration at 3-4, ¶ 6.

<sup>152</sup> See Reply at 27-29.

<sup>153</sup> See Reply at 28-29.

<sup>154</sup> Reply at 29 (citing *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, 77 F.C.C.2d 187, 197, ¶ 29 (1980)).

<sup>155</sup> See Complaint, Exhibit 5.

<sup>156</sup> Complaint, Singleton Affidavit at 5-6.

conservative estimates of the charges and surcharges at issue.”<sup>157</sup> We do not fault Georgia Power entirely. As the complainant, Knology bears the burden of proof in this proceeding. Thus, after Knology establishes a *prima facie* case regarding specific accounts, Georgia Power must produce evidence explaining the challenged charges. Georgia Power, to an extent, did so via the Detwiler Declaration, which substantiates the various figures Knology proffers. Thus, there appears to be an agreement that, with respect to the dedicated employees, Knology has paid \$297,342 for “direct labor” costs; \$72,281 for Georgia Power’s standard employee performance incentive compensation plan; \$9,408 for a “salary adjustment” to compensate one employee for additional responsibilities; \$27,495 for payroll taxes; and \$29,861 for workers compensation and other benefits (such as healthcare).<sup>158</sup> In addition, Knology has paid \$95,136.68 for materials and equipment utilized by the dedicated employees<sup>159</sup> and \$2,451 for services provided by third parties in connection with the work of the dedicated employees.<sup>160</sup> As indicated above, we believe these costs appropriately were billed to Knology.

50. We agree with Knology, however, that Georgia Power improperly seeks to recover additional amounts beyond Knology’s estimates without adequately meeting its burden of production regarding the charges. In particular, Georgia Power claims that, based on a “revised spreadsheet,” Knology owes an additional \$190,805.86 for “GPESS SUPR & ADMIN” costs, which are costs purportedly associated with the dedicated employees.<sup>161</sup> Georgia Power, however, offers no explanation or support for this figure.<sup>162</sup> Georgia Power states simply that these are additional costs attributable to the two dedicated employees that Georgia Power has incurred but for which Knology has failed to pay. Georgia Power does not provide any discernable backup or itemization of this \$190,805.86.<sup>163</sup> Without such evidence, we cannot

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<sup>157</sup> Knology Response to Georgia Power’s Supplemental Information at 8.

<sup>158</sup> Complaint, Exhibit 5; Georgia Power’s Supplemental Information, Detwiler Declaration at 6-8, ¶¶ 13-23.

<sup>159</sup> We arrive at this figure by adding \$2,584 for materials and supplies (Georgia Power’s Supplemental Information, Detwiler Declaration at 6-7, ¶ 15) and \$92,552.68 for radio usage, computer and telecommunications costs (Georgia Power’s Response to Commission’s Requests at 13, ¶ 8).

<sup>160</sup> This amount is described in the Detwiler Declaration as “Accounts Payable.” Georgia Power’s Supplemental Information, Detwiler Declaration at 7, ¶ 16. Although Knology initially challenged the reasonableness of these charges, which included cell phone charges and occasional meals, Georgia Power explained the nature of this category of charges in its Response, *see* Mills Declaration at 16, ¶ 39, and Knology did not subsequently dispute the explanation provided by Georgia Power. Thus, we conclude that this category of expenses, at least on this record, is reasonably included as an appropriate direct overhead charge.

<sup>161</sup> Georgia Power’s Supplemental Information, Detwiler Declaration at 8-9, ¶ 24.

<sup>162</sup> Georgia Power’s Supplemental Information, Detwiler Declaration at 8-9, ¶ 24 & Exhibit 2 (Revised Spreadsheet simply listing GPESS SUPR. & ADMIN. figure of \$819,001.50 of which Knology purportedly has paid \$628,195.64).

<sup>163</sup> Georgia Power refers to its general ledger but that document is virtually indecipherable and

conclude that such costs are reasonable and will not require Knology to pay them.<sup>164</sup>

**b. Indirect Overhead Costs**

51. In addition to the overhead costs directly attributable to the dedicated employees, Georgia Power imposed a charge on Knology for its *pro rata* share of all overhead costs incurred by Georgia Power that are not directly applicable to a specific project, but that relate to all capital construction projects performed in the region.<sup>165</sup> Examples of these costs are the pay and expenses of managers, supervisors, financial and accounting personnel, and other support personnel.<sup>166</sup> For simplicity, we refer to these costs as the “indirect overhead costs,” and the fee imposed on Knology as the “indirect overhead charge.” Georgia Power explains that it calculates Knology’s *pro rata* share of these indirect overhead costs by adding (1) the ratio of the total regional overhead costs to the total regional capital construction costs, and (2) a percentage representing Knology’s share of general corporate overhead expenses.<sup>167</sup> Georgia Power calculates that during the year 2000, the indirect overhead charge equaled 41.09 percent of the capital construction costs.<sup>168</sup> Although we conclude that Georgia Power may charge Knology for reasonable indirect overhead costs, we believe that Georgia Power’s application of indirect overhead expenses in this case is unreasonable.

52. First, because we have concluded that certain of the direct charges Georgia Power imposed on Knology are unreasonable, we must also conclude that the associated overhead charges are unreasonable.<sup>169</sup> This is because the indirect overhead charges are calculated as a percentage of the direct costs. As Georgia Power explains, the 41.09% indirect overhead figure

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Georgia Power provides no analysis for how the \$190,805.86 is derived from the ledger.

<sup>164</sup> We reiterate here that Knology, like other attachers, bears the burden of proving that charges are unreasonable in this proceeding. Once Knology establishes that charges are not reasonably supported or itemized, however, the burden of production shifts to Georgia Power to justify the inadequately supported charges. This shifting of the burden of production is particularly appropriate in cases such as this, where the utility has unique access to information and records concerning its charges. *See National Communications Assoc., Inc. v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) (explaining that it is appropriate to shift the burden of production to the party with easier access to relevant information).

<sup>165</sup> Georgia Power’s Supplemental Information, Detwiler Declaration at 10-11, ¶¶ 27-30.

<sup>166</sup> Georgia Power’s Supplemental Information, Detwiler Declaration at 10, ¶ 27.

<sup>167</sup> Georgia Power’s Supplemental Information, Detwiler Declaration at 10-11, ¶¶ 27-30.

<sup>168</sup> Georgia Power’s Supplemental Information, Detwiler Declaration at 11, ¶ 30. This figure consists of 30.21 percent for regional overhead and 10.88 percent for corporate overhead, for a total overhead rate of 41.09 percent. Corporate overhead expenses are not included in the calculation of regional overhead expenses. Georgia Power’s Response to Commission’s Requests at 13.

<sup>169</sup> *See* Georgia Power’s Response to Commission’s Requests at 10-13 for an explanation as to how indirect overhead charges were calculated and assessed.

is multiplied against a portion of the direct costs charged to Knology to derive a dollar amount of indirect overhead costs charged to Knology.<sup>170</sup> Because we have found a portion of the direct costs to be unreasonable, the indirect costs are therefore also unreasonable. Thus, even if we were to conclude that the overhead percentage developed by Georgia Power in this case were reasonable, which we do not, Georgia Power would nevertheless have to recalculate the overhead expenses consistent with the conclusions rendered elsewhere in this order concerning the direct costs.

53. Second, Knology persuasively points out that several of the indirect overhead expenses are comprised of functions that the two dedicated employees performed directly for the Knology project and for which Knology already paid Georgia Power. For example, a large percentage of the indirect overhead expenses is comprised of indirect labor expenses, consisting of charges for Distribution Manager, Distribution Supervision, Engineering Supervisor, and Operating Associate.<sup>171</sup> Georgia Power readily concedes that some of these indirect labor functions were performed directly by the dedicated employees assigned to the Knology project.<sup>172</sup> Knology contends that, because it agreed to pay a premium for two Georgia Power “dedicated management employees” to “coordinate and oversee the Knology project,”<sup>173</sup> and these employees performed the management and supervisory functions captured in the indirect overhead expenses calculation, then Knology should not be required to pay for a share of the indirect expenses related to management and supervisory functions performed by other Georgia Power employees for other projects.<sup>174</sup> Knology points out that it would have had to pay its share of these indirect labor expenses *if it did not pay for the two dedicated employees*.<sup>175</sup> In Knology’s view, to require Knology to pay a share of indirect costs associated with the functions performed by the dedicated employees *and* to pay for the dedicated employees amounts to an unreasonable duplicative charge.<sup>176</sup> We agree. Accordingly, we require Georgia Power to recalculate the indirect overhead expenses to account for the fact that Knology paid for two dedicated employees. Further, Georgia Power must support its calculation by documenting the actual overhead costs and the formula used to derive the new overhead calculation. This calculation, if done properly, should yield an overhead percentage less than the 41.09 percent

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<sup>170</sup> Georgia Power’s Supplemental Information, Detwiler Declaration at 12, ¶ 31.

<sup>171</sup> Knology’s Reply to Georgia Power’s Supplemental Information at 13-14.

<sup>172</sup> Georgia Power’s Response to Commission’s Requests at 14.

<sup>173</sup> Knology’s Reply to Georgia Power’s Supplemental Information at 12 (quoting Detwiler Declaration at ¶¶ 11, 15).

<sup>174</sup> Knology’s Reply to Georgia Power’s Supplemental Information at 12-14.

<sup>175</sup> Knology’s Reply to Georgia Power’s Supplemental Information at 13-15.

<sup>176</sup> Knology’s Reply to Georgia Power’s Supplemental Information at 14-15.

figured initially calculated by Georgia Power.<sup>177</sup>

**5. Knology Is Entitled to a Refund for Amounts It Paid After June 8, 2001.**

54. Knology acknowledges that, with few exceptions, the Commission has limited refunds in pole attachment proceedings to amounts paid after the complaint was filed.<sup>178</sup> Nonetheless, Knology argues that the Commission has authority to order more expansive remedies in pole attachment complaint proceedings, and that this case warrants a refund of payments Knology made throughout the Augusta make-ready project.<sup>179</sup> In particular, Knology contends that it was unable to determine whether the make-ready bills were unreasonable until well after they were paid,<sup>180</sup> and that it wished to pursue settlement discussions with Georgia Power prior to filing suit.<sup>181</sup>

55. We decline to award Knology a refund dating back to the inception of the Augusta make-ready project, because Knology has not demonstrated that it is entitled to such relief. Unlike the attachers in *Cable Texas* – a decision on which Knology relies heavily – Knology waited a substantial period of time to contest Georgia Power’s make-ready charges and to attempt to negotiate a settlement with Georgia Power.<sup>182</sup> Specifically, although the Augusta project started in 1998, it was not until mid-2001 that Knology requested detailed information substantiating the charges.<sup>183</sup> In light of this delay of more than two years, Knology’s claim that

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<sup>177</sup> Knology also states that only “reasonable” costs can form the basis of a reasonable overhead charge. As an example, Knology argues that it would be unreasonable “if ballpoint pens were attributed a cost of \$300 a piece.” Knology’s Response to Commission’s Requests at 11. The record lacks any evidence that would allow us to rule on the reasonableness of individual expenses that comprise a portion of the indirect overhead rate. Regardless, we accept Georgia Power’s explanation that such costs are scrutinized by the Georgia Public Service Commission. The indirect overhead costs must be allocated among all parties for whom Georgia Power is performing capital construction projects, including Georgia Power itself. The portion of the indirect overhead costs that are allocated to Georgia Power are ultimately borne by Georgia Power’s electric rate payers. The Georgia Public Service Commission reviews these costs to ensure that unreasonable costs are not charged to electric ratepayers. Accordingly, such costs are entitled to a presumption of reasonableness, which has not been rebutted in this case.

<sup>178</sup> Complaint at 26, ¶ 62.

<sup>179</sup> Complaint at 27, ¶ 63 (citing *Cable Texas*, 14 FCC Rcd at 6653-54, ¶¶ 18-19); at 28, ¶ 65; Reply at 31 (citing *Cavalier Telephone v. Virginia Elec. & Power Co.*, 15 FCC Rcd 9563, 9579, ¶ 42, *vacated by settlement*, 2002 FCC LEXIS 6385 (Dec. 3, 2002)).

<sup>180</sup> Complaint at 28, ¶ 65.

<sup>181</sup> Complaint at 31, ¶ 70.

<sup>182</sup> Similarly, in *Cavalier Telephone*, unlike here, there was no evidence of a long delay in challenging make-ready procedures.

<sup>183</sup> Complaint, Singleton Affidavit at 2-7, ¶¶ 4-9.

it only recently could ascertain whether Georgia Power's bills were unreasonable (because the bills were not sufficiently itemized and because Knology could not ascertain what percentage of total project charges the make-ready bills represented) rings hollow.<sup>184</sup>

56. As Knology correctly notes,<sup>185</sup> the procedures governing petitions for temporary stays relate to removal of facilities/termination of service to those facilities, increase in pole attachment rates, and non-routine modification of facilities.<sup>186</sup> Consequently, a petition for temporary stay normally is not available to resolve complaints (such as this one) regarding make-ready practices. That does not mean, however, that attachers complaining about make-ready practices are denied an effective form of relief. The remedy is for attachers promptly to question practices or charges that they believe are unreasonable and begin negotiations concerning those practices or charges. If negotiations fail or would be fruitless, attachers may promptly seek relief here at the Commission.

57. Nevertheless, we agree with Knology that we have broad authority to fashion remedies in pole attachment complaint proceedings.<sup>187</sup> Because Knology began its discussions with Georgia Power concerning make-ready costs several months prior to filing its complaint, we believe it is appropriate to depart from our general rule that the filing of a complaint marks the beginning of the refund period.<sup>188</sup> In a letter dated June 8, 2001 (the "June 8 Letter"), Knology first advised Georgia Power that Knology had "started a cost and production evaluation of our Augusta project," and requested detailed back-up information regarding Georgia Power's bills.<sup>189</sup> Georgia Power argues that the June 8 Letter does not constitute a "notice of objection or

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<sup>184</sup> Complaint at 28, ¶ 65.

<sup>185</sup> Complaint at 29, ¶¶ 66-68.

<sup>186</sup> See 47 C.F.R. § 1.1403(c).

<sup>187</sup> Complaint at 26, ¶ 62.

<sup>188</sup> Georgia Power argues that, under the Agreement, Knology has waived its right to assert claims against Georgia Power. Response at 21 (citing Complaint, Exhibit 1 (Section 8.2: Time to Bring Claims)). As explained above, however (*see* Section III(A)(1), *supra*), the Agreement does not exclusively govern the parties' relationship, as the Commission has independent jurisdiction to assess complaints regarding unreasonable make-ready practices.

<sup>189</sup> Complaint, Singleton Affidavit, Exhibit 1 (Letter dated June 8, 2001 to Mark Mills, Georgia Power, from Wayne Singleton, Director of Make Ready, Knology). Specifically, Knology requested (1) field measurements and field notes used to determine construction recommendations; (2) final construction recommendations given to existing utilities prior to the use of NJUNS; (3) Georgia Power construction contractor billing records with labor and equipment usage and costs (time sheets and/or invoices); (4) material issues and credits with quantities, unit costs and any additional charges (construction work orders); (5) Georgia Power Engineering Support billing records with breakdown and/or definition of labor, overhead and journal charges; (6) Quality Control reports and field notes for post construction inspections; and (7) description and documentation of any additional make ready charges not included within the above requested information. *Id.*

claim.”<sup>190</sup> We agree that the June 8 Letter does not state expressly that Knology was challenging Georgia Power’s make-ready practices. Nevertheless, we believe Georgia Power reasonably should have concluded that Knology objected to the lack of billing information Georgia Power provided and the necessity of certain make-ready work given the letter’s request for detailed back-up billing information.<sup>191</sup> Consequently, as more particularly specified elsewhere in this order, we award Knology a refund for certain amounts it paid after June 8, 2001.<sup>192</sup>

58. Finally, we deny Georgia Power’s request for an evidentiary hearing.<sup>193</sup> Georgia Power cites to a recent Eleventh Circuit opinion in which the court noted that a party requesting a hearing in a pole attachment complaint proceeding must “identify a material question of fact that warrants a hearing.”<sup>194</sup> Georgia Power has not done so in this case. Indeed, any information gaps in the record are the result of the utility’s failure to come forward with sufficient information responsive to Knology’s allegations and the Commission’s requests. Thus, although in appropriate instances an evidentiary hearing may be warranted, a party to a pole attachment complaint cannot avail itself of a hearing by refusing to provide adequate responses to the Commission’s factual inquiries, as Georgia Power has done here. Moreover, in light of the parties’ extensive submissions in this matter, we believe that the record before us amply explains their respective positions, and that we are able to render a decision without such a hearing.

**6. Georgia Power’s Failure to Provide Sufficiently-Detailed Billing Information After Knology Requested It In June 2001 Is An Unreasonable Practice.**

59. Knology contends that Georgia Power’s provision of bills that do not describe the

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<sup>190</sup> Georgia Power’s Reply to Knology’s Response to Commission’s Requests at 6.

<sup>191</sup> At least one Georgia Power witness acknowledges that the June correspondence represented a “shift in attitude” and a “sudden change of heart” from a concern about the speed of the project to a concern about the reasonableness of the costs. Response, Mills Declaration at 19-20, ¶ 47. Our determination regarding the sufficiency of the June 8 Letter is based upon the specific facts of this case. In future cases, when an attachor argues that it is entitled to a refund relating to make-ready practices beginning on some date other than the date the complaint is filed, we will closely examine any relevant correspondence to determine whether the utility sufficiently was put on notice regarding the existence of make-ready claims.

<sup>192</sup> Although one Knology witness asserts that he raised concerns about one category of Georgia Power’s charges during the weekly meetings (Casey Reply Affidavit at 3, ¶¶ 5-6), Knology offers no contemporaneous evidence of any such complaints and Georgia Power disagrees that Knology raised any such complaints (*see generally* Response at 30-31). In any event, we conclude that an attachor must submit its concerns about unreasonable conduct in writing to the utility to put the utility adequately on notice that the attachor is challenging unreasonable charges or practices.

<sup>193</sup> Response at 32; Georgia Power’s Reply to Knology’s Response to Commission’s Requests at 23.

<sup>194</sup> Georgia Power’s Reply to Knology’s Response to Commission’s Requests at 23 n.31 (citing *Alabama Power*, 311 F.3d at 1372).

basis for and components of its make-ready charges impedes Knology's ability to determine whether the charges are reasonable.<sup>195</sup> According to Knology, the failure to provide additional information, after Knology requested it in June 2001, constitutes an unreasonable practice under section 224 of the Act.<sup>196</sup>

60. Georgia Power essentially concedes that it did not provide the billing back-up information to Knology when Knology requested it. Georgia Power, however, defends its failure to provide the detailed billing information on the ground that the parties had agreed to a true-up arrangement, and that Georgia Power accordingly had no obligation to make detailed information available until a later time. Georgia Power asserts that Knology consequently should be required to pay the cost of compiling the information prior to the true up.<sup>197</sup> As discussed above,<sup>198</sup> in our view, Georgia Power has failed to establish the existence of a true-up agreement. Accordingly, this defense fails.

61. Georgia Power also claims that requiring it to pay the cost of compiling the information Knology requests runs counter to the Agreement.<sup>199</sup> Section 16.6 of the Agreement, however, only requires Knology to pay fees or disbursements incurred in connection with "administrative services not otherwise required to be performed by Georgia Power under this agreement."<sup>200</sup> We believe that Georgia Power had an obligation to provide a reasonable amount of information sufficient to substantiate its make-ready charges and do not view this as an "extra" administrative service for which a separate charge should apply. In our view, requiring Knology to pay for the collection and provision of adequate billing back-up information would impose an unreasonable cost on Knology's attempt to evaluate the reasonableness of Georgia Power's underlying charges.

62. We therefore hold that Georgia Power's refusal to provide the detailed billing information that Knology requested in June 2001, on the specific grounds Georgia Power has asserted, was an unreasonable practice under section 224 of the Act. Georgia Power is directed to provide reasonable billing back-up information in the future consistent with the findings in this Order.

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<sup>195</sup> Complaint at 21, ¶ 50.

<sup>196</sup> Complaint at 22-23, ¶ 56.

<sup>197</sup> Response at 26.

<sup>198</sup> See Section III(A)(2), *supra*.

<sup>199</sup> Response at 26.

<sup>200</sup> Complaint, Exhibit 1 (Section 16.6: Payment of Expenses).

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**IV. ORDERING CLAUSES**

63. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 224, and sections 0.111, 0.311, and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1410, that the Complaint filed by Knology, Inc. on November 1, 2001, IS GRANTED IN PART, to the extent indicated herein, and otherwise IS DENIED.

64. IT IS FURTHER ORDERED that Georgia Power Company SHALL REFUND to Knology, Inc, within thirty (30) days of the release of this Order \$51,662.88.

65. IT IS FURTHER ORDERED that this Memorandum Opinion and Order constitutes a Citation against Georgia Power Company, pursuant to section 503(b)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(5), for violations of section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224. Georgia Power Company may request an interview with Commission staff at the nearest field office. Subsequent violations of this type may lead to initiation of a monetary forfeiture proceeding against Georgia Power Company.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary